No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's brief fails to meet the issues presented upon this appeal, and contains many misleading statements and inferences not supported by the record.

Answer to Point I of Appellee's Argument.

Appellee does not question appellant's contention that if premature payments are shown on the face of the complaint, appellee has failed to state a claim upon which relief can be granted. Appellee merely argues:

1. That the payments made by appellee were not premature because they were made, not to the subcontractor but direct to the furnishers of labor and material for the account of the subcontractor.

Appellant contends that if a payment is premature when made to a subcontractor, it is premature when made to others for the account of the subcontractor, and appellee has cited no authority to the contrary.

2. That all payments made by appellee "were within the terms of the subcontract."

The subcontract contains no provision for payment by appellee in excess of 90% of engineers estimates and 90% of useable materials in stockpile. [Tr. p. 23.] This provision of the subcontract is definite and controlling as to the amount which appellee could pay to or for the subcontractor during the progress of the job. Under the terms of the bond, appellee was required, as a condition precedent to any liability of the surety, to retain the last payment payable and all reserves and deferred payments retainable by the obligee under the terms of the subcontract. [Tr. p. 34.]

At pages 10 and 11 of its brief, appellee urges the court to apply to this case the holding in the cases of *Burr v. Gardella,* 53 Cal. App. 377, 200 Pac. 493 and *Siegel v. Hechler,* 181 Cal. 187, 183 Pac. 664, instead of the holding in the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.,* 214 Cal. 384, 6 P. (2d) 888, cited by appellant.

In the case of *Burr v. Gardella,* the court did not lay down the rule that premature payments could be made. The court held that because the contract, which was a public contract, specifically provided for the immediate payment of claims for labor and material, that when read together with the other conditions of the bond which provided only for payment of such claims by the contractor if they were not paid,—that authorized the making of

payments, and the court said that the payments were not premature because the obligation to pay immediately was just as binding as the other obligation.

That case was decided in 1921, and the Supreme Court of California in *Siegel v. Hechler* specifically held that even where the owner is compelled, in order to avoid liens, to pay money to laborers and materialmen, he cannot recover to the extent of the premature payments.

Appellee states at page 8 of its brief that Articles VI and XI of the subcontract provided it could make certain payments "and charge same against the subcontractors." This is not true. The Articles in question merely authorized appellee to "deduct" certain payments from amounts "due the subcontractor."

Also on page 8 of its brief, appellee contends that the contract, the subcontract and the bond "are to be considered as one instrument and constitute the contract between appellee, the subcontractors and appellant." In support of this contention, appellee quotes from the cases of *Roberts v. Security Trust and Savings Bank,* 196 Cal. 575, 238 Pac. 673 and *Pacific States Electric Co. v. U. S. F. & G. Co.,* 109 Cal. App. 691, 293 Pac. 812 (erroneously cited by appellee as 282 Pac.).

In the *Roberts v. Security Trust and Savings Bank* case, the bond specifically provided that it guaranteed the performance of the contract, together with any modifications which might thereafter be made, and in the *Pacific States Electric Co. v. U. S. F. & G. Co.* case, the bond guaranteed the labor and material claims. In the case at bar, the bond contains express conditions precedent, each of which must be performed before the obligee can have any valid claim whatsoever under the terms of the subcontract.

plant was to produce 800 cubic yards of material, and that it is to be presumed that they were to be erected within a reasonable time depending on the circumstances of the case.

Appellee at all times interpreted the subcontract to provide that each plant was to produce 800 cubic yards of suitable material per day. [Tr. pp. 7, 463, 472-473.] The subcontract itself provided that "time is of the essence of this agreement." [Tr. p. 31.] Nick L. Basich testified that the second plant did not start operating until between the 25th of March and the 1st of April. [Tr. p. 573.] This was more than five weeks after production of material was to have been commenced.

At page 14 of its brief, appellee contends that there is no evidence as to when it actually acquired knowledge of the default of the subcontractors. As pointed out at page 28 of appellant's opening brief, George W. Kovick, general superintendent of appellee, testified that he was in the pit on February 11, 1945 and every day thereafter through February. Nick L. Basich testified that whenever he was on the job he "was every day in that pit." [Tr. p. 574.] Basich further testified that when he wrote the letter of April 5, 1945, he knew of his own knowledge that Duque & Frazzini did not commence the production of material on February 19, 1945. [Tr. pp. 596-597.] Furthermore, the testimony of both Kovick and Basich shows an entire familiarity with the movements of the subcontractors. Basich testified that Duque wasn't there the first time he was over there, but Frazzini was there all the time,—every time he was there Frazzini was there [Tr. pp. 574-575], and when asked whether both Duque and Frazzini were at the pit every day, Kovick answered

that Frazzini was there the largest part of the time in February, and Duque showed up on the job some time in March. [Tr. p. 621.]

Appellee further states on page 16 of its brief, that "Production commenced between February 19 and February 25, 1945," but contends that there is no evidence that appellee was aware during that time that material was not actually being produced, or whether it acquired the information at a later date. On this point we have the testimony of George W. Kovick, general superintendent for appellee, who testified:

> "Q. Do you have your books with you, that most contractors prepare during the construction of a job? A. No. I believe that is in the files of Basich Brothers Construction Company. We generally keep a job diary.
>
> Q. What do you call the job diary—the 'black book?' A. No.
>
> Q. What is it? A. In this case it was a little brown book, used for my convenience, more than anything else, showing the starting date of the project and the arrival of the various types of equipment on the project.
>
> Q. Did you mark in there the date Duque & Frazzini completed construction of the first crusher plant, or the assembling of it? A. No. I marked down the first date they started producing material." [Tr. pp. 621-622.]

It is thus shown that appellee knew, through its general superintendent, the exact day the first material was produced. It is presumed that if the evidence as to the exact day the first material was produced had been favorable to appellee, it would have put it into the record.

conditions of the subcontract on its part to be performed, by stating that some of the alterations made in the contract without the consent of the surety, were requested by and were for the benefit of the subcontractors, and that therefore the surety not being injured thereby, cannot complain.

As said in the case of *McMannus v. Temple Estate Co.*, 10 Cal. App. (2d) 419, 51 P. (2d) 1124:

> "It is settled, however, that the parties to an obligation cannot materially alter its definite terms without a guarantor's consent even though such parties in good faith believe it is to the guarantor's advantage to make the alteration. We are not required and under the law are not permitted to speculate whether the alteration benefits or injures the guarantor."

Answer to Point III of Appellee's Argument.

Appellee's argument under Point III, commencing at page 20 of its brief, is fully answered by appellant in its opening brief, commencing at page 40.

Answer to Point IV of Appellee's Argument.

Appellee's statement at the top of page 26 of its brief that appellant's "own representative, Mr. Bray, testified that his investigation disclosed that no facts were concealed" is a clear misrepresentation of the evidence. We quote from the record the testimony referred to by appellee to support this statement:

> "Mr. Monteleone: Let us put it in plain words. The Glens Falls Indemnity Company, in its Proposed Amended Answer, accuses the Basich Brothers Con-

struction Company of concealing facts from the Glens Falls Indemnity Company. Have you, in your investigation, found any facts which were concealed from the Glens Falls Indemnity Company by the Basich Brothers Construction Company?"

This question was objected to by counsel for appellant and after some discussion the following occurred:

"Mr. McCall: Answer if you have any personal information on the subject.

A. I have no personal information.

Q. (By Mr. Monteleone:) And you acquired your information from your investigation, did you? A. I did not.

Mr. McCall: I object to that as assuming something not in evidence.

Mr. Monteleone: He has answered it. He said he did not." [Tr. pp. 750-751.]

Appellant submits that the foregoing falls far short of supporting the statement of appellee.

The case cited by appellee on page 25 of its brief, *Sherman v. American Surety Co.*, 178 Cal. 286, 290, 173 P. 161, no bearing on the point here argued. No question of concealment from the surety was involved in that case.

On page 26 of its brief, appellee contends that appellant is estopped from asserting such concealment and has waived same. Appellee cannot now, for the first time in its brief on appeal, urge either waiver or estoppel in connection with this defense.

Answer to Point V of Appellee's Argument.

The contention made by appellant at page 49 of its opening brief is that the evidence shows that appellee had control of and did supervise and control the subcontract work.

At page 27 of appellee's brief this is flatly denied, and whereas appellant referred to the testimony of George W. Kovick, general superintendent [Tr. p. 627], showing that he did supervise the subcontract work, appellee has referred to pages 632, 771 and 772 of the Transcript, at which point the record merely gives a description of two plants constructed near the pit by appellee, one, a batch plant for combining concrete aggregate, and the other an asphalt plant. According to the testimony referred to by appellee, these plants were not even installed at the time referred to by Kovick when he said he was supervising work relative to the necessary production of material. [Tr. p. 772.]

Subparagraph 2 on page 27 of appellee's brief, infers that the subcontract authorized appellee to carry all the employees of Duque & Frazzini on its own payroll, pay the bills with appellee's checks, and name itself as the employer in all returns and reports, but does not refer to any evidence in support of this statement, and we submit that there is no provision in the subcontract in support thereof.

Subparagraph 3, on page 27 of appellee's brief flatly denies that George W. Kovick, its general superintendent, countermanded any order of Carson Frazzini on or about May 19, 1945 as stated at Paragraph 5 on page 50 of appellant's opening brief. That he did countermand appellant's orders was testified to by George W. Kovick [Tr. pp. 656-659] and Nick L. Basich [Tr. pp. 605-607].

In Subparagraph 6 on page 28 of appellee's brief, it denies that appellee set the rate of wages of subcontractor's employees. In answer to this we find the following testimony by George W. Kovick:

> "Q. In connection with the employees on the subcontract, do you know who set the wages for regular time and overtime? A. Me, and the unions." [Tr. p. 617.]

The foregoing fairly illustrate the misrepresentations to be found throughout appellee's brief

Answer to Point VII of Appellee's Argument.

Point VII of appellee's argument, beginning at page 30 of its brief fails to meet the issues raised in Point VII of appellant's opening brief beginning at page 61, on the subject of election and raises no point which is not fully answered by appellant's opening argument.

Answer to Point VIII of Appellee's Argument.

While appellee's brief beginning at page 32 contains statements not supported by the record, we do not believe that any point is raised on the question of interest which is not fully answered in appellant's opening brief beginning at page 64.

Answer to Point IX of Appellee's Argument.

Appellant's opening brief at page 69 states "All of the testimony of appellee's witness George J. Popovich was based on a false foundation." This statement appellee has not denied, but endeavors to excuse the misrepresentations which were made to the court that the records were in court and available to opposing counsel, by contending

that the evidence, though based on a false foundation, should stand, because appellant did not make a motion to strike, after the testimony, on cross-examination, was found to be false. It is the contention of appellant that after it made its objection and the witness was allowed to testify on the representation of appellee that the original records were in court, and after this representation was shown to be false it was not necessary to make any further objection or motion.

> "An objection made and ruled on need not be repeated when similar evidence is thereafter offered (Citing Salt Lake City v. Smith, 104 Fed. 457, Mine & Smelter Supply Co. v. Parke & Lacy Co., 107 Fed. 881), and it need not be renewed by a motion to strike (Citing Grand Trunk Pac. R. Co. v. Tollard, 286 Fed. 676)."
>
> *Cyclopedia of Federal Procedure,* 2nd Edition, Vol. 7, p. 543.

After the representation of appellee that the original records were in court, was shown to be false, the court suggested to appellee that on the following day it bring in all of the records in connection with the case. [Tr. pp. 404-405.]

Appellee argues that because it brought into court eight boxes of records the following day, the testimony of Popovich should stand.

There is no evidence that anything in the eight boxes produced in court by appellee was admissible in evidence, nor that appellee had in court any person who could identify the contents.

Appellee states on page 37 of its brief that eight boxes of records were brought into court and made available

"which appellant conceded showed that the payments were made." A reference to the record cited by appellee [Tr. pp. 404-406] will show that this was an entirely incorrect statement, and that appellant did not concede that the contents of the eight boxes showed anything. There is no evidence that the boxes were opened, or the contents exhibited to anyone.

Answer to Point X of Appellee's Argument.

The case cited by appellee in Point X is not at variance with the case cited by appellant at Point X, page 75 of its opening brief, which case is controlling on the point in question.

Conclusion.

For the reasons set out in appellant's opening brief, the judgment should be reversed.

Respectfully submitted,

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